

# ANALYSIS OF AMENDED BILL

## Franchise Tax Board

Author: Shelley and Migden Analyst: Gloria McConnell Bill Number: AB 822  
Related Bills: See Legislative History Telephone: 845-4336 Amended Date: 08/29/02  
Attorney: Patrick Kusiak Sponsor: \_\_\_\_\_

**SUBJECT:** Public Record Disclosure

### SUMMARY

This bill would make various changes to the California Public Records Act (PRA), including a requirement that state agencies justify the withholding of any record and the establishment of an Attorney General (AG) appeal process.

### SUMMARY OF AMENDMENTS

The August 19, 2002, amendments deleted the provisions related to adult day health care, which did not impact the Franchise Tax Board (FTB), and added the above provisions to this bill.

The August 20, 2002, amendments provide that if a court award is made subsequent to AG review, 50% of the award goes to the General Fund.

The August 29, 2002, amendments provide that a state agency may retain counsel other than the AG and that counsel would be compensated at the same rate the AG would charge for legal services.

This is FTB's first analysis of this bill.

### PURPOSE OF THE BILL

From information available on similar bills introduced in prior years, the purpose of this bill appears to be to provide recourse if a state agency does not furnish information with regard to a PRA request.

### EFFECTIVE/OPERATIVE DATE

This bill would be effective on January 1, 2003, and specifies an operative date of July 1, 2003.

### POSITION

Pending.

#### Board Position:

<input type="checkbox"/> S	<input type="checkbox"/> NA	<input type="checkbox"/> NP
<input type="checkbox"/> SA	<input type="checkbox"/> O	<input type="checkbox"/> NAR
<input type="checkbox"/> N	<input type="checkbox"/> OUA	<input checked="" type="checkbox"/> PENDING

#### Department Director

#### Date

Gerald H. Goldberg

9/9/02

## **ANALYSIS**

### **FEDERAL/STATE LAW**

Under the federal Freedom of Information Act, a person has the right to appeal a denied information request to the head of the agency and subsequently to a federal court.

The California PRA:

- Requires that all state and local agencies make their public records available for public inspection during office hours, except as exempted by law. If a state agency withholds any public record, it must demonstrate that 1) the record was exempt from disclosure, or 2) the public interest for nondisclosure outweighed the public interest for disclosure.
- Requires each agency within 10 days from receipt of a request for a copy of records to determine whether the request seeks disclosable public records. In unusual circumstances the 10-day time limit is subject to an extension of time.
- Allows any person to institute a court proceeding to enforce his or her right to obtain copies of public records.
- Allows a judge to set time frames with the objective of securing an early decision. If a judge finds that the record was properly withheld from disclosure, the judge must return the record to the agency without disclosure. This decision may be appealed.
- Awards a successful plaintiff court costs and reasonable attorney fees. However, if the plaintiff's case is found to be frivolous, the court must award costs and fees to the public agency.

### **THIS BILL**

This bill would:

- Require that written requests for inspection of public records be directed to the head of each public agency. In the case of a multi-member board, such as the Franchise Tax Board (FTB), the request would be addressed to the executive officer.
- Require that a state agency explain in writing a decision to withhold any record either because it falls under a specified exemption from disclosure or because the public interest is best served by withholding the record from disclosure.
- Establish a procedure to allow any person to appeal to the AG if a state or local agency denies access to a public record. The appeal must be filed within 20 days after the person receives the agency's written decision to not produce a record. In the case where the agency fails to respond, AG review may be sought no less than 20 days and no more than 40 days after the request was delivered or mailed.

An appeal to the AG could not be made by a party to a pending proceeding involving the state agency or an employee of the agency, or by a party to a pending investigation by the agency, if the AG has or is providing legal advice or representation to the state agency with regard to the related proceeding or investigation.

- Require the AG to issue a written opinion within 20 working days after receiving the appeal on whether the agency's response or lack of response complied with the PRA. The AG could expand the 20-day period by an additional 30 working days to issue a written opinion if the AG needs to obtain additional documentation, obtain copies, conduct extensive research, or if there is an unmanageable increase in the number of appeals received by the AG.
- Allow the AG to request additional documentation from the agency and request a copy of the records in question.
- Allow a person to file an action in court regarding the disclosure of a requested record before exhausting the administrative remedies described above with the AG.
- Allow a superior court to award a plaintiff an amount not more than \$100 for each day, up to a maximum of \$10,000, that the agency denied the right of the plaintiff to inspect the record, if the court determines that the agency acted in bad faith or had knowledge that the request sought nonexempt records. If a court award is made subsequent to AG review, 50% of the award would go to the General Fund.

### IMPLEMENTATION CONSIDERATIONS

Implementing this bill would not significantly impact the department's programs and operations.

### **LEGISLATIVE HISTORY**

SB 48 (Sher 1999/2000), which was essentially the same as this bill, was vetoed by Governor Davis. The message indicated it was vetoed because of the bill's interaction with another bill he signed and its potentially significant costs for the AG.

SB 2027 (Sher 1999/2000), which was essentially the same as this bill, was vetoed by Governor Davis. The message indicated it was vetoed because the problem perceived by the proponents would not be resolved by this bill's establishment of additional bureaucratic processes. The message further directed the Governor's Administration to review all state agencies' performances regarding PRA requests and make recommendations accordingly.

### **OTHER STATES' INFORMATION**

All states and the federal government have public record laws. The laws of *Illinois*, *Michigan*, *Minnesota*, *Massachusetts*, and *New York* were reviewed because their tax laws are similar to California's income tax laws.

Under *Illinois* law, the denial of a public record request made to the Department of Revenue may be appealed to the Director of the Department of Revenue.

Under *Massachusetts* law, the highest appellate court has jurisdiction to order compliance with a public record request.

Under *Michigan* law, denials of public record requests either may be appealed to the director within the subject government agency or may be reviewed in an action commenced in the trial court.

Under *Minnesota* law, the denial of public records request may be pursued by bringing an action before a judicial officer, arbitrator, administrative law judge, or an action of a similar nature.

Under *New York* law, the denial of a public record request may be appealed to the agency and subsequently an action may be brought in court.

## **FISCAL IMPACT**

### Departmental Costs

Because this bill authorizes a new administrative review by the AG, it could increase the department's costs related to disclosure. However, this increase is expected to be minor and too speculative to quantify.

## **ECONOMIC IMPACT**

### Tax Revenue Estimate

This bill would not impact the state's income tax revenues.

## **LEGISLATIVE STAFF CONTACT**

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